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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: March 13, 2013
Time: 2:00 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

1 The parties submit this joint statement for the March 13, 2013 Case Management
2 Conference.

3 **I. Case Progress**

4 Since the January 17, 2013 Case Management Conference, the case has progressed as
5 follows.

6 The fact discovery cutoff is March 29, 2013. (Dkt. 183.) Fact discovery is continuing,
7 and the parties have reported the status of discovery in their regular statements to the Court,
8 including most recently on March 1, 2013. (Dkt. 336.)

9 **II. Case Management**

10 The Court's January 17, 2013 Case Management Order set forth the major deadlines for
11 the litigation of the case through trial. (Dkt. 282.)

12 **A. Expert Disclosure Schedule**

13 The parties are continuing to meet and confer on this issue and will promptly advise the
14 Court if agreement is reached.

15 **1. Plaintiffs' Statement**

16 Plaintiffs respectfully seek the Court's guidance on a percolating issue concerning the
17 schedule for expert disclosures. The case schedule provides that initial expert reports are due on
18 April 11, 2013, and rebuttal expert reports are due on May 2, 2013. (Dkt. 282.) The schedule
19 does not provide an opportunity for Plaintiffs to respond to opinions and critiques of Defendants'
20 expert. Plaintiffs anticipate that this will most likely create an issue at trial, when Plaintiffs'
21 expert will need to address critiques or new analyses Defendants include in their "rebuttal" expert
22 report. For instance, during Defendants' briefing of the class certification opposition, Defendants
23 included original regression analyses purporting to show that their violations of the law caused no
24 damages (or "negative" damages). Likewise, at this stage of the case, Defendants may include
25 other kinds of new quantitative analysis or variations on Plaintiffs' experts' analysis in their
26 critique of Plaintiffs' expert, just as Dr. Murphy did here during class certification.
27
28

1 Plaintiffs cannot anticipate every possible criticism, variation, or original analysis that
 2 might be contained in Defendants' "rebuttal" expert report. In the absence of any response by
 3 Plaintiffs before trial, Plaintiffs are concerned that their expert will be required to respond to
 4 Defendants' critiques for the first time in trial testimony. This may prove problematic for all
 5 involved for several reasons, including that Defendants presently do not agree they will not move
 6 to preclude Plaintiffs' expert testimony on this very ground, and that Plaintiffs simply do not
 7 subscribe to trial by ambush.

8 Plaintiffs propose two alternative solutions to this issue, neither of which would alter the
 9 case schedule:

- 10 1. Defendants include all original analysis in an opening report, due on April 11,
 11 2013, to which Plaintiffs would respond in a simultaneous rebuttal on May 2,
 12 2013; or
- 13 2. The Parties agree to a schedule for a responsive disclosure that will not interfere
 14 with the rest of schedule, limited to the issues raised in Defendants' "rebuttal"
 15 analysis.¹

16 Either of these alternative solutions would be acceptable to Plaintiffs. Plaintiffs suggest
 17 that the second option, permitting a further disclosure, would be most consistent with the
 18 purposes of the Federal Rules. *See, e.g.*, Fed. R. Civ. P. 26(a)(2).

19 Plaintiffs have raised this matter with Defendants, but to date their position is that they
 20 just want to maintain the schedule as is. If the *status quo* is maintained, Plaintiffs respectfully
 21 submit that it will only make the trial process unwieldy, as Plaintiffs' expert responds to
 22 Defendants' "rebuttal" analysis without advance disclosure. Nevertheless, Plaintiffs are
 23 comfortable with presenting their response to Defendants' expert critiques and analyses for the
 24 first time at trial, so long as it will not burden the Court.²

25
 26 ¹ Plaintiffs are also amenable to a further time-limited deposition tailored solely to new rebuttal
 points.

27 ² Plaintiffs note that Defendants devote significant space in this CMC Statement to re-litigating
 28 class certification issues. Defendants' supplemental argument is clearly irrelevant to the issues
 currently at hand, manifestly improper, and should be stricken. Moreover, Defendants'

2. Defendants' Statement

The Court addressed and resolved this issue at the October 26, 2011 Case Management Conference and in its October 26, 2011 Minute and Case Management Order and its September 12, 2012 Case Management Order. As the Court explained to Plaintiffs on October 26, 2011, using damages as an example: "You do the opening report, they do the rebuttal, you'll get to do depositions of each other's experts." (Dkt. 94 at 67:10-12.) Plaintiffs now renew their complaint that they will not have an opportunity to respond to Defendants' expert reports, citing the sequence of expert reports submitted on the motion for class certification. In fact, that experience shows why Plaintiffs' proposal is unnecessary. (This is presented to respond to plaintiffs' position, not (as they inaccurately suggest) to reargue the Rule 23 motion).

Three rounds of expert reports addressing issues of impact and damages have already occurred: Dr. Leamer's opening report, including his "conduct regression" that lumped all seven defendants together; Dr. Murphy's critique showing that running the same regression for each defendant individually invalidated Leamer's model; and Dr. Leamer's reply report (with yet another regression analysis) that addressed one of Murphy's critiques but had no answer for the second. Thus, Dr. Leamer has already had two chances to create a workable regression equation, including a chance to respond to Dr. Murphy's critique; his report due April 11 will be his third opportunity to address these issues.

Plaintiffs also ignore the Court-ordered schedule when they assume that they will be permitted to present not only one more set of regression analyses, in their opening April 11 report, but also another set in response to defendants' May 2 report—and that the only question is the timing of the last round, namely, whether they would present it before or during trial. Defendants submit that if, as we believe will be the case, Dr. Leamer's April 11 regression will still be inadequate, there is no reason to afford him yet another try.

Nevertheless, as noted, the parties are continuing to confer.

speculation about the content and focus of Plaintiffs' merits expert reporting, and their critique of a report they will not receive for many weeks, is baseless.

B. Document Authentication

1. Plaintiffs' Statement

Plaintiffs also respectfully seek the Court's guidance at the intersection of the close of discovery and Plaintiffs' need to authenticate documents and evidence for trial. Plaintiffs cannot now be certain whether the witnesses they will depose over the next month are all of the correct witnesses who will be able to authenticate all of the Defendants' business records that Plaintiffs may wish to introduce at trial. This is amplified by the fact that several Defendants continue to produce documents and privilege logs, and may expect to continue producing documents and privilege logs until discovery closes (for instance, earlier this week Defendants Google and Lucasfilm each produced tens of thousands of additional pages of documents, including documents associated with custodians whose depositions Plaintiffs already took).³ The danger to Plaintiffs is that they may be cut off from conducting discovery necessary for authentication purposes that they could not have completed during the discovery period.

Plaintiffs have raised this matter with Defendants, but to date Defendants have been unable to commit to stipulating to an extension of the discovery deadline exclusively for the purpose of evidence authentication, or to stipulating that the documents they have produced are authentic business records. Barring an agreement that would alleviate this conundrum within the

³ On March 4, 2013 (three days after the parties submitted their last Discovery Report), Google produced an additional 39,439 pages of documents, including documents associated with custodians whose depositions Plaintiffs already have taken. Lucasfilm also produced on March 4, 2013 an additional 72,213 pages of documents, including documents associated with several custodians who already have been deposed. At this point, Plaintiffs have not had sufficient opportunity to review the documents to determine whether they contain material that would properly have been included in depositions that have already been completed. Plaintiffs also were notified on today's date that Adobe would produce today approximately 400 additional documents associated with an Adobe witness whose deposition is set for this coming Monday. Plaintiffs object to these belated productions. While Google's counsel now claims that the tens of thousands of pages it has just produced represent a small number of files, many of the documents are from a custodian set to be deposed tomorrow—March 7, 2013—and arrived without warning, leaving Plaintiffs scant opportunity to review them. Moreover, long before Plaintiffs even knew of this production, Plaintiffs had requested the courtesy of a later deposition date for this very witness, a request Google did not accommodate. Lucasfilm's accusation that Plaintiffs are somehow to blame for manufacturing a discovery dispute on the eve of a case management conference, when on the eve of a case management conference Lucas increased the volume of its entire production to date by nearly 50%, is particularly misplaced.

1 next month, if the *status quo* is maintained, Plaintiffs respectfully submit that this too may make
 2 the trial process more unwieldy and expensive, and impact its fairness.⁴

3 **2. Defendants' Statement**

4 **a. Document Authentication**

5 Defendants have no intention of wasting time at trial on the authenticity of their
 6 documents. Apple is prepared to stipulate to the authenticity of documents it has created and
 7 produced in this litigation, and other Defendants likely are as well.

8 In any event, Defendants respectfully submit that there is no issue for the Court to decide
 9 at this juncture. Plaintiffs have served the discovery that they believe they need to address their
 10 concerns, which addresses not just the authenticity, but the *admissibility*, of every document
 11 produced in this litigation. Defendants will respond to this discovery, as well as meet and confer
 12 as necessary. Any disputes will be brought to the Court's or Magistrate Judge Grewal's attention.

13 **b. Supplemental Document Productions**

14 Finally, Plaintiffs' footnote objection to recent document productions is another attempt to
 15 manufacture "discovery disputes" immediately before case management conferences. Adobe's
 16 production of about 460 documents resulted from a vendor mistake and consists largely of drafts
 17 and duplicates of previously produced documents. Plaintiffs do not contend that they need more
 18 than five days to review this small number of documents. But if they did, Adobe will work with
 19 them to find a later deposition date, still before the end of discovery. No good purpose is served
 20 by complaining about inadvertence that causes no prejudice.

21 Lucasfilm's March 4, 2013 document production included 350 documents located in
 22 connection with search terms that Plaintiffs first requested on October 25, 2012, months after
 23 Lucasfilm had substantially completed its document production pursuant to search terms
 24

25 ⁴ Defendants have advised Plaintiffs in this Statement that they believe these matters may be
 26 resolved with time. Plaintiffs welcome that news. However, in the event this does not happen or
 27 if Plaintiffs are required to expend substantial resources to authenticate Defendants' standard
 28 business records (including emails sent to, from and among their employees), Plaintiffs do not
 want the Court to be left with the misimpression that Plaintiffs had not raised this concern well
 before the close of discovery.

1 Plaintiffs had agreed to in March 2012. When Plaintiffs reneged on the parties' agreement
2 regarding search terms and demanded new searches based on new terms, they knew their new
3 demand might result in production of new documents from the files of witnesses they wanted to
4 depose. Despite knowing this, Plaintiffs never conferred with Lucasfilm about the timing of
5 document production or made any attempt to set the depositions for dates after the document
6 production. On February 14, 2013, Plaintiffs asked Lucasfilm for the first time when its
7 production of documents responsive to the new search terms would be complete. The next day,
8 Lucasfilm informed Plaintiffs that Lucasfilm would complete that production by March 5, 2013.
9 Yet again, plaintiffs made no objection, and raised no issue related to depositions, nearly all of
10 which had been scheduled by that date. Lucasfilm adhered to the March 5 production deadline.
11 Plaintiffs never objected to any of this until this CMC statement. In addition to sandbagging
12 Lucasfilm with this objection, Plaintiffs claim no prejudice. They do not contend that any of
13 these documents should have been produced earlier, pursuant to the parties' March 2012
14 agreement. They do not contend any of the documents have any substantive importance to the
15 case or any previously deposed witness.

16 The remaining 621 documents in Lucasfilm's March 4, 2013 production are for a
17 custodian (Steve Condiotti) whom Plaintiffs sought to depose for the first time in January 2013
18 and who is not scheduled to be deposed until March 20, 2013. As the Court may recall, the
19 parties discussed the issue of document productions related to newly-requested deponents at the
20 last CMC, and Lucasfilm has abided by the Court's directions to produce documents substantially
21 before the depositions of any newly-requested custodians. Again, Plaintiffs claim no prejudice
22 and have no basis to do so.

23 Plaintiffs also "object" to Google's recent production of 39,439 pages of documents on
24 March 1, 2013. Over 39,200 pages of this production, however, is comprised of 10 excel
25 spreadsheets. (The large volume of pages is the result of formatting issues and the conversion of
26 the spreadsheets to TIFF images.) Plaintiffs complain that these documents are "associated with"
27 previous Google deponents, but the spreadsheets contain data that is largely---if not entirely---
28

1 duplicative of data produced in productions prior to any depositions. Moreover, in the depositions
 2 taken thus far of current and former Google personnel, Plaintiffs have never marked as an exhibit
 3 any of the voluminous number of spreadsheets or data produced by Google during the course of
 4 discovery. Plaintiffs' "objection" is much ado about nothing, and they make no showing
 5 whatsoever that they are prejudiced by the production of these spreadsheets---nor is there any
 6 basis for such a suggestion. With respect to the claim that Google did not accommodate
 7 Plaintiffs' request to change a deposition date, as Google explained to Plaintiffs' counsel at the
 8 time, Google worked with the deponent in an effort to identify an alternative date, but because of
 9 the numerous other Google depositions previously scheduled, and the competing schedules of the
 10 witness and counsel, an alternative date could not be found.

11
 12 Dated: March 6, 2013

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16 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
17 the filing of this document has been obtained from all signatories.